

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA)	
)	
And)	
)	
STATE OF TEXAS)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	<u>CONSENT DECREE</u>
)	
City of Carthage,)	
)	
Defendant.)	
_____)	

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WHEREAS Plaintiff United States of America and Plaintiff State of Texas ("Texas") on behalf of the Texas Commission on Environmental Quality ("TCEQ"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint in this action on [date] alleging that Defendant, City of Carthage ("City"), violated Section 301 of the Clean Water Act ("Act"), 33 U.S.C. § 1311;

WHEREAS the Complaint against Defendant alleges, pursuant to Section 301 of the Act, 33 U.S.C. § 1311, that the violations concern exceedances of permit effluent violations and other conditions of NPDES Permit No. TX0032361 issued by EPA during the period of at least January, 1997 through March, 2001;

WHEREAS Defendant has read and understands the terms of this Consent Decree and acknowledges receipt of a copy of this Consent Decree;

WHEREAS the Parties hereby waive all rights of appeal and any claims of duress that might be made;

WHEREAS Defendant has actively participated in negotiations leading up to this Consent Decree and is well aware the duties placed upon it by this Consent Decree, and is willing and able to carry out those duties in full;

WHEREAS Defendant does not admit any liability to the United States or Texas arising out of the transactions or occurrences alleged in the Complaint; and

WHEREAS the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest,

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, below, and with the consent of all Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the Act, 33 U.S.C. § 1319(b), and over the Parties. Venue lies in this District pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1391 (b) and 1395(a), because Defendant resides and is located in this judicial district, and the violations alleged in the Complaint are alleged to have occurred in, and Defendant conducts

business in, this judicial district. For purposes of this Decree, Defendant does not contest the Court's jurisdiction over this action or over Defendant and does not contest venue in this judicial district.

2. For purposes of this Consent Decree only, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to Sections 301 and 309 of the Act, 33 U.S.C. §§ 1311 and 1319.

3. Notice of the commencement of this action has been given to the State of Texas, as required by Section 309(b) of the Act, 33 U.S.C. § 1319(b)..

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States and Texas; and upon Defendant, its agents, successors, and assigns.

5. At least thirty (30) days prior to transferring ownership or operation of the Facility to any other person, Defendant shall provide a copy of this Consent Decree to each prospective successor owner or operator and shall simultaneously verify such by a written notice to EPA Region 6, the United States Attorney for the Eastern District of Texas, TCEQ and the Office of Attorney General of Texas and the United States Department of Justice, in accordance with Section XVII of this

Decree (Notices). Any such transfer must be conditioned upon the transferee's agreement to undertake the obligations required by this Decree, and no such transfer shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. Defendant's obligations hereunder shall expire upon the termination of this Consent Decree.

6. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree; Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree. Defendant's obligations hereunder shall expire upon the termination of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree. Further, Defendant hereby waives any claim or defense it might make to the enforcement of this Consent Decree to the effect that any laws of the State of Texas prevent or hinder Defendant from raising any revenues necessary to comply completely with this Consent Decree; and further, Defendant

affirmatively avers that it has sufficient funds or has ready access to sufficient funds to pay all sums and to perform or have performed all injunctive provisions required by this Consent Decree.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Consent decree which are defined in the Act or in regulations promulgated pursuant to the Act, shall have the meaning assigned to them in the Act and such regulations. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

A. "CWA" shall mean the federal Clean Water Act.

B. "Complaint" shall mean the complaint filed by the United States in this action;

C. "Compliance" as that term is used in this document, shall include completion of the activities under this Consent Decree, or any work plan or other plan approved under this Consent Decree, in accordance with all applicable requirements of this Consent Decree, and within the specified time schedules established by and approved under this Consent Decree.

D. "Consent Decree" shall mean this Decree and all appendices attached hereto;

E. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

F. "Defendant" shall mean the City of Carthage, Texas;

G. "DOJ" shall mean the United States Department of Justice.

H. "Effective Date" shall mean the date of entry of this Consent Decree by the Court after satisfaction of the public notice and comment procedures set forth in Section XXIII of this Consent Decree (Public Participation);

I. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

J. "Facility" shall mean Defendant's wastewater treatment facility located in Carthage, Texas.

K. "Paragraph" shall mean a portion of this Decree identified by an Arabic numeral;

L. "Parties" shall mean the United States, the State of Texas and Defendant;

M. "Permit" shall mean NPDES Permit No. TX0032361, issued to Defendant by EPA.

N. "Section" shall mean a portion of this Decree identified by a roman numeral;

O. "State" and "Texas" shall mean the State of Texas.

P. "TCEQ" shall mean the Texas Commission on Environmental Quality, an agency of the State of Texas.

Q. "United States" shall mean the United States of America, acting on behalf of EPA;

IV. CIVIL PENALTY

9. Within 30 days after the Effective Date of this Consent Decree, Defendant shall pay to the United States the sum of \$20,000 as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with instructions to be provided to Defendant following lodging of the Consent Decree by the Financial Litigation Unit of the U.S. Attorney's Office for the Eastern District of Texas. At the time of payment, Defendant shall simultaneously send written notice of payment and a copy of any transmittal documentation

(which shall reference DOJ case number and the civil action number of this case) to the United States and Texas in accordance with Section XVII of this Decree (Notices).

10. Defendant shall not deduct the civil penalty paid under this Section in calculating its federal income tax.

V. INJUNCTIVE RELIEF

11. It is the express purpose of the Parties in executing this Consent Decree that Defendant shall perform all measures necessary to achieve and maintain compliance with applicable requirements of the Act, applicable State law, and NPDES Permit No. TX0032361 with respect to the Facility.

12. Defendant shall construct a chlorination treatment system sufficient to prevent any future exceedances of Permit effluent limits at its Facility. Defendant shall implement the "City of Carthage, Texas Wastewater Treatment Plant Disinfection System Improvements Construction Drawings" dated October, 2003, as amended as of September 1, 2004. Defendant shall implement the construction and other performance milestones in accordance with the details and schedule set forth and incorporated herein as Attachment A. The performance schedule shall include, among other milestones, the bid, start and completion dates for construction of the chlorination treatment system.

13. Certification of Completion of Construction and Review by EPA. The City shall provide written notice, signed by the City Manager, to EPA as the City completes each milestone set forth in Attachment A. The City shall provide written notice and certification of completion, signed by the City Manager, to EPA and the State when it has completed construction of the chlorination treatment system.

14. After receipt of each such notice of completion, EPA in consultation with the State will determine whether the City has completed the applicable upgrade requirements of Attachment A. Upon review, EPA will notify the City in writing whether the City has completed the applicable requirements of Attachment A. If EPA, after consultation with the State, determines that the applicable construction requirements are incomplete, then, within 30 days of EPA's written request, Defendant will notify EPA in writing of an expedited schedule for completion and thereafter take the appropriate steps promptly to complete any applicable requirements that remain.

15. EPA will monitor the City's Discharge Monitoring Reports during the 12-month period following completion of the improvements in Attachment A to determine compliance with this Consent Decree, the Act, state law, and the Permit. If the City continues to discharge effluent in violation of Permit limits

during this period, then, within 30 days of EPA's written request, the Defendant shall propose additional compliance measures sufficient to eliminate any future exceedances of its permit effluent limits, shall submit a proposed schedule for the additional measures and, subject to an EPA approved schedule, shall implement the additional measures accordingly.

VI. OPERATION AND MAINTENANCE REQUIREMENTS

16. No later than 30 days after the effective date of this Consent Decree, Defendant shall provide to EPA a description of the job responsibilities and qualifications present among Facility personnel who have direct or oversight responsibilities regarding CWA quality assurance and quality control matters.

17. No later than 120 days after the effective date of this Consent Decree, Defendant shall prepare, or review and modify, as necessary, and submit to EPA an operation and maintenance manual for the sewage treatment plant. This manual, together with its revisions shall include, but not necessarily be limited to, a description of day-to-day responsibilities, operations, reasonably anticipated potential operational problems and solutions (e.g., trouble-shooting procedures) for Defendant's sewage treatment plant operators, other appropriate supervisory personnel, and individuals having related environmental responsibilities at the Facility. This manual must also identify

and, where appropriate, cross-reference the Consent Decree, Permit, and CWA requirements addressed in the CWA handbook required under Paragraph 19, *infra*.

18. Within 60 days after written approval has been received from EPA on any manuals, plans or handbooks, Defendant shall submit to EPA a draft agenda regarding upcoming training and thereafter shall conduct formal classroom and on-the-job training sessions for the workers, appropriate supervisory personnel, and individuals having related environmental responsibilities, involved with the operations and requirements described in that particular manual, plan, or handbook. The draft agenda must be submitted at least five days prior to the training. Within thirty days after the completion of training, the Defendant shall submit to EPA a certification of training which shall include the names of the individuals trained, the date(s) on which the training took place, the duration (in hours) of the training, and a brief description of the training. Thereafter, formal training for the workers, appropriate supervisory personnel, and individuals having related environmental responsibilities involved with the operations and requirements described in any particular manual, plan, or handbook shall occur on an annual basis for two years beginning in calendar year 2005, and shall also be provided to any such

employee hired by Defendant the effective date of this Consent Decree. Defendant also agrees that any new personnel hired after the effective date of this Consent Decree, and hired to be involved in the operations and requirements described in any particular manual, plan, or handbook, shall receive appropriate training on the contents of the manual, plan, or handbook within 30 days of commencement of employment. Certification of the annual training is required for calendar years 2005 and 2006.

19. No later than 60 days after the effective date of this Consent Decree, Defendant shall develop and submit to EPA a CWA handbook describing the CWA requirements and responsibilities applicable to the Facility, with a particular focus on the Permit requirements regarding effluent limits, monitoring, reporting and record keeping responsibilities, as well as requirements imposed by this Consent Decree. The specifics of such CWA handbook shall include but not necessarily be limited to:

- i. CWA, Consent Decree, and Permit requirements;
- ii. Operation and maintenance practices and procedures regarding storm water monitoring, reporting, and record keeping;
- iii. Operation and maintenance practices and procedures regarding monitoring, reporting and

record keeping at all outfalls for all parameters identified in the NPDES Permit; and

iv. Operation and maintenance practices and procedures regarding internal and external laboratory analytical quality assurance and quality control.

20. Permits. Where any obligation required to be met under this Consent Decree requires a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section XI (Force Majeure) of this Consent Decree for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit required to fulfill such obligation provided timely applications are submitted.

VII. REVIEW OF SUBMITTALS

21. After review of any plan, report, or other item that is required to be submitted to EPA pursuant to this Consent Decree, EPA, after consultation with TCEQ, shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

22. If the submission is approved pursuant to subparagraph (a) of Paragraph 21, the City shall take all actions required by the plan, report, or other item, as approved. If the submission is conditionally approved or approved only in part, pursuant to subparagraphs (b) or (c) of Paragraph 21, the City shall, upon written direction of EPA, take all actions required by the approved plan, report, or other item that EPA determines to be technically severable from any disapproved portions, subject to the City's right to dispute only the specified conditions or the disapproved portions, under Section XII of this Consent Decree (Dispute Resolution).

23. If the submission is disapproved in whole or in part by EPA pursuant to subparagraph (c) or (d) of Paragraph 21, the City shall, within thirty (30) days after the date of the written disapproval or such other time as the Parties agree in writing, correct all deficiencies and resubmit the amended plan, report, other item, or disapproved portion thereof, for approval.

24. If an amended and resubmitted plan, report, or other item, or portion thereof, is disapproved by EPA in whole or in part, EPA, after consultation with TCEQ, may again require the City to correct any deficiencies, in accordance with this Section, subject to the City's right to invoke Dispute Resolution.

25. If EPA fails to notify the City of its approval or disapproval, or otherwise provide comments, within sixty (60) days after receiving the submittal, the completion dates for each milestone in the submittal, once approved, shall be deemed extended by the number of days beyond sixty (60) that EPA took for such approval, disapproval or comment.

VIII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

26. Defendant shall implement a Supplemental Environmental Project ("SEP"), referred herein as the Septic Tank Replacement SEP, in accordance with all provisions of Attachment B to this Consent Decree, which is attached hereto and incorporated into this Decree by reference. The SEP shall be completed within 12 months after the effective date of this Decree. The SEP shall replace domestic septic tanks at 29 houses with city sewer line hookups. In implementing the SEP, Defendant shall spend not less than Two Hundred Thirty Thousand Dollars (\$230,000) in eligible SEP costs. Eligible SEP costs include the costs of planning and implementing the SEP.

27. Defendant is responsible for the satisfactory completion of the SEP in accordance with the requirements of this Decree. "Satisfactory completion" means that Defendant shall complete the work in accordance with all work plans and specifications submitted to and approved by EPA pursuant to the

procedures set forth for the project above in Section VII and shall spend not less than the amount set forth in Paragraph 26 above. Defendant may use contractors and/or consultants in planning and implementing the SEP.

28. With regard to the SEP, Defendant certifies the truth and accuracy of each of the following:

A. That all cost information provided to EPA in connection with EPA's approval of the SEP is complete and accurate and represents a fair estimate of the costs necessary to implement the SEP;

B. That, as of the date of executing this Decree, Defendant is not required to perform or develop the SEP by any federal, state, or local law or regulation, nor is Defendant required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

C. That the SEP is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

D. That Defendant has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action; and

E. That Defendant will not receive any reimbursement for any portion of the eligible SEP costs.

29. SEP Completion Report

A. Within 30 days after the date set by written EPA approval for completion of the SEP, Defendant shall submit a SEP Completion Report to the United States and the State, in accordance with Section XVII of this Consent Decree (Notices). The SEP Completion Report shall contain the following information:

- i. A detailed description of the SEP as implemented;
- ii. A description of any problems encountered in completing the SEP and the solutions thereto;
- iii. An itemized list of all eligible SEP costs;
- iv. Certification that the SEP has been fully implemented pursuant to the provisions of this Decree; and
- v. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

30. EPA may, in its sole discretion, require information in addition to that described in the preceding Paragraph, in order to determine the adequacy of SEP completion or eligibility of SEP costs.

31. After receiving the SEP Completion Report, the United States shall notify Defendant whether or not Defendant has satisfactorily completed the SEP. If the SEP has not been satisfactorily completed in accordance with all schedules, or if the amount expended on performance of the SEP is less than the amount set forth in Paragraph 26, above, Stipulated Penalties may, in EPA's sole discretion, be assessed under Section X of this Consent Decree.

32. Disputes concerning the satisfactory performance of the SEP and the amount of eligible SEP costs may be resolved under Section XII of this Decree (Dispute Resolution). No other disputes arising under this Section shall be subject to Dispute Resolution.

33. Each submission required under this Section shall be signed by an official with knowledge of the SEP and shall bear the certification language set forth in Paragraph 37 below.

34. Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the SEP under this Decree shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action, *United States and the State of Texas v. City of Carthage, Texas*, taken on behalf of the U.S. Environmental

Protection Agency and the Texas Commission on Environmental Quality under the Clean Water Act."

IX. REPORTING REQUIREMENTS

35. Defendant shall submit the following reports:

A. Within thirty (30) days after the end of each calendar-year quarter of each year (by April 30, July 31, October 31, and January 31 of each year) after lodging of this Consent Decree, until termination of this Decree pursuant to Section XXI, Defendant shall submit a quarterly progress report for the preceding quarter that shall include the status of any activities required pursuant to this Consent Decree, including construction or compliance measures, completion of milestones, operation and maintenance of the Facility and progress/completion of the SEP;

B. If Defendant violates any requirement of this Consent Decree or of any applicable permits, Defendant shall notify the United States and the State of such violation and its likely duration in writing within ten (10) working days after the day Defendant first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall include a statement to that effect in the report. Defendant shall

immediately investigate to determine the cause of the violation and then shall submit an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) days after the day Defendant becomes aware of the cause of the violation. If Defendant seeks to invoke force majeure, it shall comply with the requirements of Section XI of this Decree.

36. All reports shall be submitted to the persons designated in Section XVII of this Consent Decree (Notices).

37. Each report submitted by Defendant pursuant to this Consent Decree shall be signed by a responsible official of the submitting party and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my inquiry of those individuals immediately responsible for obtaining the information, that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

38. Defendant shall retain all underlying documents from which it has compiled any report, notice or other submission

required by this Consent Decree until five years after termination of the Decree pursuant to Section XXI.

39. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit or other requirement.

40. Any information provided to EPA pursuant to this Consent Decree may be used by the United States and or the State in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

X. STIPULATED PENALTIES

41. Defendant shall be liable for stipulated penalties pursuant to the terms of this Section to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XI (Force Majeure).

42. Stipulated Penalties for Violations of Compliance Requirements

A. If Defendant fails to pay the civil penalties required to be paid under Section IV of this Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$500 per day to the United States for each day that the payment is late. Stipulated Penalties shall be paid in accordance with Section X, Paragraph 47, below. All transmittal correspondence

shall state that any such payment is for late payment of the civil penalty due under this Decree, or for Stipulated Penalties for late payment, as applicable, and shall include the identifying information set forth in Paragraph 9, above.

B. The following stipulated penalties shall accrue per violation per day for failure to meet the milestones set forth in Attachment A, failure to meet the SEP requirements, or any other compliance requirements set forth in this Consent Decree that are not subject to other stipulated penalties set forth herein:

Penalty Per Violation Per Day	Period of Noncompliance
\$500.00	1st through 14th day
\$750.00	15th through 30th day
\$2,000.00	31st day and beyond

43. Defendant shall be liable to the United States for stipulated penalties for exceedances of the effluent limits specified in NPDES Permit No. TX0032361 during the period from date of lodging through the term of the Consent Decree. For violations of Weekly Average limits, Defendant shall be liable to the United States for stipulated penalties of \$1,000 per parameter per week. For violations of any 30-Day average or Monthly Average limits, Defendant shall be liable to the United

States for stipulated penalties of \$2,500 per parameter per month.

44. Stipulated Penalties for Violations of Reporting Requirements and Submittal Requirements. The following stipulated penalties shall accrue per violation per day for any noncompliance with the requirements for submitting plans, handbooks, manuals, or reports, of this Consent Decree:

Penalty Per Violation Per Day Period of Noncompliance

\$250	1st through 14th day
\$500	15th through 30th day
\$1,000	31st day and beyond

45. The United States shall make a demand for stipulated penalties accruing for violations under this Consent Decree, and such stipulated penalties shall be payable in accordance with the following paragraphs.

46. All stipulated penalties must be paid within thirty (30) days after the date of any demand for payment. Stipulated penalties that are not paid when due shall be subject to interest in accordance with paragraph 52. Stipulated penalties owing to the United States shall, as directed by the United States, be paid by EFT in the amount due payable to the "U.S. Department of Justice," referencing DOJ No. and United States Attorney's Office file number 2001V00879, and

delivered to the office of the United States Attorney, Eastern District of Texas.

47. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree.

48. All stipulated penalties shall begin to accrue on the day after the performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

49. Penalties shall continue to accrue as provided in accordance with Paragraphs 42 and 44 during any dispute resolution, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

A. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, accrued penalties determined to be owing, together with accrued interest, shall be paid to the United States within thirty (30) days after

the effective date of the agreement or the receipt of EPA's decision or order;

B. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall, within sixty (60) days after receipt of the Court's decision or order, pay all accrued penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph C, below;

C. If the District Court's decision is appealed by any Party, Defendant shall, within fifteen (15) days after receipt of the final appellate court decision on the issue of the penalties, pay all accrued penalties determined to be owing to the United States, together with accrued interest.

50. Upon the Effective Date of this Consent Decree, stipulated penalties for violations of applicable permit requirements, missed milestones, or other noncompliance, occurring between the date of lodging and the Effective Date of this Consent Decree shall be payable pursuant to the terms of this Section.

51. Should Defendant fail to pay stipulated penalties in accordance with the terms of this Consent Decree, the United States shall be entitled to collect interest on such penalties, starting on the date payment was due, as provided for in 28

U.S.C. § 1961, together with the costs (including attorneys fees) incurred in any action necessary to collect any such stipulated penalties or interest thereon.

52. Subject to the provisions of Section XV of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States by reason of Defendant's failure to comply with any requirement of this Consent Decree or applicable law, except that for any violation of the Act for which this Consent Decree also provides for payment of a stipulated penalty, Defendant shall be allowed a credit for stipulated penalties paid against any statutory penalties imposed for such violation.

53. The United States shall be entitled to collect the costs (including attorneys fees) incurred in any action necessary to collect any portion of the civil penalty, stipulated penalties, or interest for late payment of the civil penalty and/or accrued stipulated penalties.

XI. FORCE MAJEURE

54. A "force majeure event" is any event beyond the control of Defendant, its contractors, or any entity controlled by Defendant that delays the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill

the obligation. "Best efforts" includes anticipating any foreseeable force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

55. Defendant shall provide notice orally or by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time Defendant first knew of, or by the exercise of due diligence, should have known of, a claimed force majeure event. Defendant shall also provide written notice, as provided in Section XVII of this Consent Decree (Notices), within seven days after the time Defendant first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); Defendant's past and proposed actions to prevent or minimize any delay; a schedule for carrying out those actions; and Defendant's rationale for attributing any delay to a force majeure event. Failure to provide oral and written notice as required by this Paragraph shall preclude Defendant from asserting any claim of force majeure.

56. If the United States agrees that a force majeure event has occurred, the United States may agree to extend the

time for Defendant to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the United States agrees to an extension of time, the appropriate modification shall be made pursuant to Section XX of this Consent Decree (Modification).

57. If the United States does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by Defendant, the United States' position shall be binding, unless Defendant invokes Dispute Resolution under Section XII of this Consent Decree. In any such dispute, Defendant bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event; that Defendant gave all notices required by Paragraph 55; that the force majeure event caused any delay Defendant claims was attributable to that event; and that Defendant exercised best efforts to prevent or minimize any delay caused by the event.

XII. DISPUTE RESOLUTION

58. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising

under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of the Defendant that have not been disputed in accordance with this Section.

59. Informal Dispute Resolution. Any dispute under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 days after the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

60. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion

supporting Defendant's position and any supporting documentation relied upon by Defendant.

61. The United States shall serve its Statement of Position within 45 days after receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

62. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XVII of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 10 days after Defendant's receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

63. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

64. In any dispute under this Paragraph, Defendant shall bear the burden of demonstrating that its position clearly complies with and furthers the objectives of this Consent Decree and the Act and that Defendant is entitled to relief under this Consent Decree and applicable law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

65. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 49 above. If Defendant does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section X (Stipulated Penalties).

XIII. INFORMATION COLLECTION AND RECORD RETENTION

66. The United States, Texas and their representatives, including attorneys, contractors, and consultants, shall have the right of entry to any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials to:

A. monitor the progress of activities required under this Consent Decree;

B. verify any data or information submitted to the United States or Texas in accordance with the terms of this Consent Decree;

C. obtain samples and, upon request, splits of any samples taken by Defendant or its representative, agents, contractors, or consultants;

D. meet with and interview employees, contractors and other agents of Defendant without the necessity of the presence or the permission of Defendant's attorney;

E. photograph, take video images of, or otherwise record any portion of Defendant's Facility and any persons, equipment, or objects present;

F. take any other action necessary to assess Defendant's compliance with this Consent Decree.

67. Upon request, Defendant shall allow split or duplicate samples to be taken by EPA and Texas or their authorized representatives. Upon request, EPA and Texas shall allow Defendant to take split or duplicate samples of any samples they take.

68. Until five (5) years after the termination of this Consent Decree pursuant to Section XXI (Termination), Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all records and documents (including records or documents in electronic form) now in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance or nonperformance of any of its obligations under this Consent Decree. This record retention requirement shall apply regardless of any document-retention policy to the contrary.

69. At the conclusion of the document-retention period provided in the preceding Paragraph, Defendant shall notify the United States and Texas at least ninety (90) days prior to the destruction of any records or documents subject to the requirements of the preceding Paragraph, and, upon request by the United States or Texas, Defendant shall deliver any such records or documents to EPA or Texas. Defendant may assert that certain

documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, reports, or other information required to be created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged. If Defendant is claiming business confidentiality for submitted documents, it shall comply with 40 C.F.R. Part 2, Subpart B when submitting such documents.

70. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or Texas pursuant to Section 308 of the Act or any other applicable federal or state laws, regulations, or permits.

XIV. FAILURE OF COMPLIANCE

71. The United States and Texas do not, by their consent to the entry of this Consent Decree, warrant or aver in

any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act or any other federal, state, or local law, regulation, or permit. Notwithstanding the United States' or Texas' review and approval of any documents submitted to them by Defendant pursuant to this Consent Decree, Defendant shall remain solely responsible for compliance with the terms of the Act and this Consent Decree. Application for construction grants, State Revolving Loan Funds, or any other grants or loans, or other delays caused by inadequate facility planning or plans and specifications on the part of Defendant shall not be cause for extension of any required compliance date in this Consent Decree.

XV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

72. This Consent Decree resolves the civil claims of the United States and Texas for the violations alleged in the Complaint filed in this action through the date of lodging.

73. This Consent Decree shall not be construed to prevent or limit the rights of the United States or Texas to obtain penalties or injunctive relief under the Act, or under other federal or state laws, regulations, or permit conditions, except as expressly specified herein.

74. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal,

State and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall not be a defense to any action commenced pursuant to any laws, regulations, or permits.

75. This Consent Decree does not limit or affect the rights of Defendant or of the United States or Texas against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

76. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

77. The United States and Texas reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein.

XVI. COSTS

78. The Parties shall each bear their own costs of litigation of this action, including attorneys fees, except as provided in Paragraphs 51 and 53, above.

XVII. NOTICES

79. Unless otherwise specified herein, whenever reports, notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the Department of Justice:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-5-1-1-07648.

To EPA:

Division Director, Compliance Assurance and Enforcement
U.S. Environmental Protection Agency
Region 6
1445 Ross Ave.
Mail Code (6EN)
Dallas, Texas 75202

and

Deputy Regional Counsel, Enforcement
U.S. Environmental Protection Agency
Region 6
1445 Ross Ave.
Dallas, Texas 75202

To the State:

Office of the Attorney General of Texas
Chief
Natural Resources Division
P.O. Box 12548
Austin, Texas 78711

Lisa Lemanczyk
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

Ruth Yeager
U.S. Attorney
110 N. College Ave.
Suite 700
Tyler, Texas 75702

To Defendant:

Patrick J. Larkin
Strasburger & Price, LLP
901 Main Street, Suite 4300
Dallas, Texas 75202

80. Notices submitted pursuant to this Section shall be deemed effective upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XVIII. EFFECTIVE DATE

81. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XIX. RETENTION OF JURISDICTION

82. The Court shall retain jurisdiction of this case until termination of this Consent Decree, for the purpose of enabling any of the Parties to apply to the Court for such further order, direction, or relief as may be necessary or appropriate for the construction or modification of this Consent

Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XII of this Decree (Dispute Resolution).

XX. MODIFICATION

83. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by the United States, Texas and Defendant. The terms and schedules contained in Attachment A to this Decree may be modified upon written agreement of the Parties without Court approval unless any such modification effects a material change to the terms of this Consent Decree or materially affects the Defendant's ability to meet the requirements or objectives of this Decree. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. Non-material changes of the terms of this Decree, including extensions of interim construction milestones, will be effective upon written agreement of the Parties without Court approval, unless any such modification materially affects the Defendant's ability to meet the objectives of this Decree.

XXI. TERMINATION

84. After Defendant has (a) completed all requirements of this Consent Decree, including the construction of a chlorination treatment system pursuant to Section V, the SEP, and

payment of the civil penalty and any accrued stipulated penalties as required by this Consent Decree, and (b) maintained continuous compliance with the requirements of the Act, its Permit and this Consent Decree for a period of 18 months after the Effective Date of this Consent Decree, then Defendant may serve upon the United States and Texas a "Motion for Termination of Consent Decree" ("Motion"), with supporting documentation demonstrating that Defendant has successfully completed all requirements of this Decree and that all other requisite conditions for termination of the Decree have been satisfied.

85. Following receipt by the United States and Texas of Defendant's Motion, the Parties shall schedule one or more conferences (which may be by telephone) to discuss the Motion and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements of the Consent Decree and whether all other requisite conditions for termination of the Decree have been satisfied.

86. If, following the consultation period provided for by Paragraph 85, above, the United States determines that Defendant has satisfactorily complied with the requirements of the Decree and that all other requisite conditions for termination of the Decree have been satisfied, the United

States shall file with the Court an appropriate pleading so notifying the Court and requesting termination of the Decree.

XXII. CONTINGENT LIABILITY OF THE STATE OF TEXAS

87. This Consent Decree does not resolve the contingent liability of the State of Texas under Section 309(e) of the Act, 33 U.S.C. § 1319(e). The United States specifically reserves its claims against the State, and the State reserves its defenses.

XXIII. PUBLIC PARTICIPATION

88. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R.

§ 50.7. The United States and Texas reserves the right to withdraw or withhold their consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice.

XXIV. SIGNATORIES/SERVICE

89. The undersigned representatives of the Defendant, the United States, and the State certify that they are fully authorized to enter into the terms and conditions

of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

90. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

91. Defendant hereby agrees not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States or Texas have notified Defendant in writing that it no longer supports entry of the Decree.

92. Defendant hereby agrees to accept service of process by mail at the address shown in Section XVII (Notices) with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXV. INTEGRATION

93. This Consent Decree, including Attachments A and B which are incorporated into the Decree, constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and

understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXVI. FINAL JUDGMENT

94. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States, Texas, and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

Dated and entered this ____ day of _____, 2004.

UNITED STATES DISTRICT JUDGE
Eastern District of Texas

FOR PLAINTIFF UNITED STATES OF AMERICA:

Date:

9.19.04

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural
Resources Division
United States Department of
Justice

Date:

ELLEN CHANG VAUGHAN
Special Attorney
United States Department of
Justice
Environment and Natural
Resources Division
c/o United States Environmental
Protection Agency
Region 6
1445 Ross Ave.
Dallas, Texas 75202

Date:

Richard E. Greene
Regional Administrator
United States Environmental
Protection Agency
Region VI
1445 Ross Avenue
Dallas, Texas 75202-2733

FOR THE STATE OF TEXAS:

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

KAREN W. KORNEILL
Assistant Attorney General
Chief, Natural Resources Division

Grant Gurley
Assistant Attorney General
Natural Resources Division
P.O. Box 12548
Austin, Texas 78711

FOR DEFENDANT:

Date: _____

Patrick J. Larkin
Counsel for City of Carthage
Strasburger & Price, LLP
901 Main St., Suite 4300
Dallas, Texas 75202